

# WHAT IS CAPACITY?

## What does having capacity mean under the NDIS?

### **Every adult is free to make their own decisions.**

As a family member, friend, carer or other individual involved with a person with a disability, you should always assume they have the capacity to make decisions, unless through an assessment and legal process it is proven they don't have capacity.

A person who has capacity is able to make decisions about things that affect their daily life, such as:

- where to live
- what to buy
- what support or services they need
- when to go to the doctor
- matters with legal consequences, including:
  - making a will
  - getting married
  - entering into a contract and having medical treatment.

People who have capacity are able to live their lives independently. They can decide what is best for themselves and take or leave the advice of others.

When a person has capacity to make a particular decision, they are able to:

- understand the facts involved
- understand the main choices
- weigh up the consequences of the choices
- understand how the consequences affect them
- communicate their decision.

In some cases a person with a disability may require assistance to clarify the issues and choices that will aid their decision-making. This is called supported decision making.

## What is supported decision making?

Supported decision making is a way of helping someone develop their skills to make their own decisions. It promotes the person's will and preference, and allows them to have greater choice and control in their lives over the things that are important to them.

If a person's capacity fluctuates because of their condition, it is crucial you discuss decisions with them when there is an indication of an increased ability to make decisions. This will enable the person to have control over as many of their decisions as possible.

The Public Guardian has produced an e-Learning package that is targeted at people who work in the disability sector and want to learn more about what support for decision making is and how to practice it. The e-Learn module is free and can be accessed by anyone via the National Disability Services website at:

[www.nds.org.au/events-and-training/all-events-and-training/supported-decision-making-e-learning-module-3039](http://www.nds.org.au/events-and-training/all-events-and-training/supported-decision-making-e-learning-module-3039)

## What is a Nominee

A Nominee is a person chosen by you, the NDIS participant, to support your decision making and act on your behalf. For example, a Nominee can talk with the NDIS about your plan and with providers about the services you receive.

If you want a Nominee to help you in this way, you need to advise your Local Area Coordinator or Planner at your planning meeting and your chosen Nominee should accompany you to this meeting.

## What about reduced capacity?

Capacity is a legal issue. Adults are presumed to have capacity to make their own decisions under the law, unless it can be shown that they lack capacity. Just because a person has a disability does not mean they lack capacity.

We may not always agree with other people's decisions. What must be determined is whether the person is simply making 'bad' decisions or if they lack capacity to make decisions. Just because a person lives an eccentric lifestyle, makes poor or controversial personal decisions does not necessarily mean they lack capacity.

A person's capacity to make decisions may depend on the type of decision that needs to be made.

## What is a Legal Guardian?

If the decisions of a person with a disability puts them or others at risk of serious harm, a Legal Guardian and/or Public Trustee can be appointed to make these decisions on their behalf. If you think you should be made a person's Legal Guardian you need to discuss this at their planning meeting. The LAC or Planner can explain the appointment process.

To become their Legal Guardian you must provide facts to show their decisions are more likely than not to put themselves or others at serious risk of harm. You will need to document how you reached this conclusion. The documentation should include the questions you asked the person, their answers or responses and an explanation of why you should be their Guardian.

A formal capacity assessment can also be made. These assessments are performed by a clinical neuropsychologist and some other qualified health professionals. They can be expensive. However, funding for an assessment can be allocated in an NDIS plan so talk about this with your LAC or NDIA Planner. The principles for assessing capacity are shown in the purple box on the right.

If you care for an adult with a disability and are making decisions for them but have not been appointed their Legal Guardian, there can be consequences. If someone successfully challenges your actions in making these decisions with the NDIS Safety and Quality Commission, a Public Guardian can be appointed, shifting decision making into their hands.

### CAPACITY ASSESSMENT PRINCIPLES

There are six principles to apply when assessing a person's capacity. The principles protect the rights of the person being assessed.

1. Start by assuming the person has the capacity to make their own decision
2. Understand that because the person cannot make a decision in one area of life does not mean that they can't make decisions in all areas of their life
3. Do not assume the person lacks capacity because of age, appearance, disability or behaviour
4. Focus on the person's ability to make a decision, not whether the decision they make is good or bad
5. Respect the person's privacy
6. Make sure the person is getting the support that they need to make their own decisions.

[https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds\\_capacity\\_tool/divserv\\_assess\\_principles.aspx](https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/divserv_assess_principles.aspx)